IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 229 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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SHENAZ D/O TAIYABBHAI

Versus

SHABIR IBRAHIM SIDA

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Appearance:

MS SEJAL K MANDAVIA for Applicant

MS MITA PANCHAL, FOR NANAVATY ADVOCATES for Opponent No. 1

MR ND GOHIL, APP for Opponent No. 2

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CORAM : MR.JUSTICE H.H.MEHTA

Date of decision: 20/12/2002

C.A.V. JUDGEMENT

1. The original applicant - Shenaz d/o. Taiyabbhai of Criminal Misc. Application No.168 of 1997, which came to be heard and disposed of by the learned Judicial Magistrate [F.C.], Junagadh has, by filing this present

Criminal Revision Application under Section 397 read with Section 401 of the Criminal Procedure Code, 1973 [for short "Cr.P.C."] challenged the correctness, legality and propriety of the judgment Ex.9 dated 26.05.1997 rendered by the learned Sessions Judge, Junagadh in Criminal Revision Application No.29 of 1997, by which the learned Sessions Judge, Junagadh was pleased to set aside the order dated 17.03.1997 passed, below application Ex.1 in Criminal Misc. Application No.168 of 1997.

2. The criminal revision petitioner is the original applicant of Criminal Misc. Application No.168 of 1997 and criminal revision opponent No.1 is the opponent in the aforesaid Criminal Misc. Application No.168 of 1997. The revision petitioner is a wife and revision opponent No.1 is a husband. For the sake of convenience, the parties will be referred to hereinafter as "wife" and "husband" respectively.

3. The facts leading to this present Criminal Revision Application in a nutshell are as follows :-

3.1 The applicant Shenaz d/o. Taiyabbhai is a wife of opponent No.1 - Shabir Ibrahim Sida. Out of their wedlock, the applicant delivered a baby female child by opponent and on the date of application, that baby female child named Tahemina was aged about one year and nine months.

3.2 It is the case of the applicant that the opponent No.1 has given mental as well as physical cruelty to her on the ground of his demand for dowry. On or about 12.03.1997, the mother of applicant had come to the house of the applicant to inquire about the well-being of the applicant. On that day, there was a quarrel between the applicant and opponent No.1. The mother of applicant had rebuked the opponent No.1, as a result of which the opponent No.1 had beaten the mother of the applicant and drove her out from the house. It is a specific case of the applicant that thereafter, the opponent No.1 snatched away minor baby girl from the custody of the applicant and, thereafter, the opponent No.1 had driven out the applicant from the house. It is the case of the applicant that the minor baby girl is infant and is feed by sucking the milk of her mother. Therefore, the father of the applicant had gone to the opponent No.1 to take custody of that infant female child, but the opponent No.1 had beaten him and driven him out from the house.

3.3 In view of the aforesaid facts and circumstances, on or about 15.03.1997, the applicant - wife filed one

application under Section 97 of Cr.P.C. to obtain a search warrant for her infant female child in the Court of learned Chief Judicial Magistrate, Junagadh. That application came to be registered as Criminal Misc. Application No.168 of 1997. The learned Chief Judicial Magistrate, Junagadh, by passing his order dated 15.03.1997, assigned that Criminal Misc. Application No.168 of 1997 to the learned 5th Joint Civil Judge [J.D.] and J.M.F.C., Junagadh. The applicant - wife had filed her affidavit just below her application. On reading this affidavit and after hearing the learned advocate for the applicant - wife, the learned Judicial Magistrate [F.C.], Junagadh [who will be referred to hereinafter as the "Magistrate of the trial Court"] passed an order below application Ex.1 and by partly allowing that application Ex.1, issued a search warrant under Section 97 of Cr.P.C. directing the Police Inspector of Junagadh City Police Station to obtain the custody of minor infant female child named Tahemina from the place, which may be shown by the applicant and produce the said child before the Court. He was also pleased to direct the office to issue a notice returnable on 17.03.1997 calling upon the opponent No.1 to remain present before the court on 17.03.1997 at 11.30 A.M. The applicant was also informed to remain present before the Court on 17.03.1997.

3.4 From the record, it appears that the Police Officer of Junagadh City Police Station searched and obtained custody of infant female child at 5.30 P.M. on 16.03.1997. On 16.03.1997, that infant female child was produced before the learned Magistrate of the trial Court. The Magistrate of the trial Court recorded a preliminary statement of the applicant and, thereafter, by passing an interim order handed over the custody of the infant child to the applicant. He also directed her to remain present before him in his Court on 17.03.1997. From the order, it appears that on 17.03.1997, neither the opponent - husband remained present personally before the Court nor he remained present through his advocate. On 17.03.1997, opponent No.1 - husband did not file any objection against the prayer of applicant made in her application at Ex.1. Thereafter, the learned Magistrate of the trial Court after taking into consideration the facts and circumstances of the case, passed an order that custody of infant minor child named Tahemina alias Sohamali, aged about 1 year and 9 months is given to the applicant and consequently, pursuant to that order, the applicant took over the custody of the said female child and by passing such order, the learned Magistrate of the trial Court disposed of that application Ex.1 on

17.03.1997.

4. Being aggrieved against and dissatisfied with the said order dated 17.03.1997, below application Ex.1 in Criminal Misc. Application No.168 of 1997 passed by the learned Magistrate of the trial Court, the opponent No.1 husband preferred a Criminal Revision Application No.29 of 1997 in the Court of leaned Sessions Judge, Junagadh, by invoking the provisions of Sections 397-399 of Cr.P.C. The learned Sessions Judge, Junagadh, after examining the material and evidence on record of Criminal Misc. Application No.168 of 1997 and after hearing the arguments of the learned advocates for both the parties, allowed that Criminal Revision Application No.29 of 1997, by rendering her judgment at Ex.9 on 26.05.1997. By allowing that Criminal Revision Application filed by the opponent No.1 - husband, the learned Sessions Judge, Junagadh set aside the order dated 17.03.1997 below application Ex.1 of Criminal Misc. Application No.168 of 1997 passed by the learned Magistrate of the trial Court. The learned Sessions Judge, Junagadh also directed the applicant wife to hand over the custody of the infant female child to the applicant - husband of Criminal Revision Application No.29 of 1997.

5. Being aggrieved against and dissatisfied with the said judgment Exh.9 dated 26.05.1997 rendered by the learned Sessions Judge, Junagadh in Criminal Revision Application No.29 of 1997, the original applicant i.e. wife has filed this present Criminal Revision Application under Sections 397 read with Section 399 of Cr.P.C.

6. I have heard Ms.S.K.Mandavia, learned advocate for the criminal revision petitioner, Ms.Mita Panchal, learned advocate for and on behalf of Nanavati Advocates, learned advocate for the revision - opponent No.1 i.e. husband and Mr.N.D.Gohil, learned APP for the revision opponent No.2 - State of Gujarat, in detail at length. I have perused the impugned judgment, which is challenged in this present Criminal Revision Application.

7. Ms.S.K.Mandavia, learned advocate for the criminal revision petitioner - wife has vehemently argued that the impugned judgment rendered by the learned Sessions Judge, Junagadh in Criminal Revision Application No.29 of 1997 is illegal, incorrect and improper and it requires to be set aside. For her arguments, she has placed reliance on the facts and circumstances of the case as well as certain authorities. As against her arguments, Ms.Mita Panchal, learned advocate for and on behalf of Nanavati Advocates, learned advocate for the

revision opponent No.1 and Mr.N.D.Gohil, learned APP for the revision opponent No.2 - State of Gujarat have supported the impugned judgment Ex.9, which is challenged in this Criminal Revision Application. They have argued that the impugned judgment and order is correct, legal and proper and the present Criminal Revision Application filed by the wife requires to be dismissed.

8. This present Criminal Revision Application can be disposed of on a sole legal point, which is not canvassed by either of the revision opponents or the petitioner and, therefore, I do not deem fit necessary to discuss and deal with the submissions made by Ms.S.K.Mandavia to burden this judgment.

9. Admittedly, the original applicant - wife filed an application under Section 97 of Cr.P.C. for search warrant to obtain a custody of infant female child i.e. her own minor daughter from the possession of the revision opponent No.1 - husband. The learned Magistrate of the trial Court passed an order below application Ex.1 in Criminal Misc. Application No.168 of 1997 and by allowing that application Ex.1 issued a search warrant and on execution of search warrant, the custody of infant female child was obtained by the Police Officer of Junagadh City Police Station and he produced that infant female child before the learned Magistrate of the trial Court on 16.03.1997 and on that day, after recording a preliminary statement of the applicant wife, custody of that infant female child was handed over to the applicant. The learned Magistrate of the trial Court had already issued notice against the opponent husband directing him to remain personally present on 17.03.1997 at 11.30 A.M. Ms.Mita Panchal, learned advocate for the revision opponent No.1 - husband has fairly conceded that the said notice was served upon the opponent - husband. On 17.10.1997, the opponent No.1 husband remained absent before the Court of learned Magistrate. He did not even take care to appear before the Court through his advocate in the case. He also did not file any objection against the prayer of the applicant. Thereafter, the learned Magistrate, after considering the facts and circumstances of the case, handed over the custody of the infant female child to the applicant wife. It is not in dispute that the order, which was passed by the learned Magistrate of the trial Court below application Ex.1 on 17.03.1997 was an order under Section 97 of Cr.P.C. The applicant husband filed a Criminal Revision Application under Sections 397-399 of Cr.P.C. challenging that order passed under Section 97 of Cr.P.C., in the Court of learned Sessions Judge, Junagadh. At this stage, it is

required to know as to whether the order passed by the trial Court under Section 97 of Cr.P.C. can be challenged in revision, because it is an inter-locutory order. In case of Harakh Singh v. Lalmuni Kuer, reported in (1977) Cri.L.J. 723 [Patna], it is held that the order passed on application under Section 97 regarding the custody of the person found is an interlocutory. The same view has been taken by this Court in a case of Mayabhai Raghavbhai v. Pancholi Dhula Amra & Ors., reported in 1984 (2), 25(2) G.L.R. 816. By placing reliance on the decision in Harakh Singh [Supra], this Court has categorically held that an order under Section 97 of Cr.P.C. is an interlocutory order. The Additional Sessions Judge had, therefore, obviously, erred in entertaining the revision application before him. When this Court has specifically held that an order under Section 97 of Cr.P.C. is an interlocutory order the revision cannot be filed against that order invoking the provisions of Section 397 Cr.P.C. Sub-Section (2) of Section 397 of Cr.P.C. bars a revision application against interlocutory order. Subsection (2) of Section 397 of Cr.P.C. reads as follows :-

> "The powers of revision conferred by sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceedings."

In view of this legal position, the husband could not have filed the Criminal Revision Application under Sections 397-399 of Cr.P.C. in the Court of the learned Sessions Judge, Junagadh. In view of Section 397(2) of Cr.P.C., the Criminal Revision Application is not maintainable against the interlocutory order and when this Court has specifically held that an order under Section 97 of Cr.P.C. is an interlocutory order, the learned Sessions Judge, Junagadh ought not to have exercised her jurisdiction in Criminal Revision Application filed by the husband. Under the circumstances, when Criminal Revision Application is not maintainable against an interlocutory order as barred under Section 397(2) of Cr.P.C., the order passed by the learned Sessions Judge, Junagadh in Criminal Revision Application is ex-facie, illegal and beyond her jurisdiction. When the Criminal Revision Application is not maintainable against an order under Section 97 of Cr.P.C., the learned Sessions Judge, Junagadh exceeded her jurisdiction by allowing that revision. As the powers of revision conferred by sub-section (1) can not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding,

the question does not arise for the learned Sessions Judge, Junagadh to entertain, hear and decide that Criminal Revision Application. It was beyond her scope to exercise her jurisdiction in such Criminal Revision Application and, therefore, the impugned judgment rendered by the learned Sessions Judge, Junagadh is prima facie, ex-facie, illegal, incorrect and improper and, therefore, the same is required to be quashed and set aside.

10. For the foregoing reasons, this Criminal Revision Application deserves to be allowed only on the aforesaid legal point and, therefore, the impugned judgment Ex.9 dated 26.05.1997 rendered by the learned Sessions Judge, Junagadh in Criminal Revision Application No.29 of 1997 is quashed and set aside and the order dated 17.03.1997 below application Ex.1 passed in Criminal Misc. Application No.168 of 1997 passed by the learned Judicial Magistrate [F.C.], Junagadh is restored and confirmed. Rule is made absolute. An interim order dated 20.06.1997 passed by this Court [Coram : R.R.Jain,J.] is made absolute.

[H.H.Mehta,J.]

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